Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent	)))	MB Docket No. 10-71

JOINT REPLY COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION AND CEQUEL COMMUNICATIONS LLC D/B/A SUDDENLINK COMMUNICATIONS

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SUMMARY

Mediacom and Suddenlink submit these reply comments (i) to respond to and rebut broadcaster comments arguing that there is no need or legal authority for the Commission to update its rules governing the exercise of retransmission consent and (ii) to offer additional proposals for regulatory reforms designed to protect consumers from broadcaster negotiating tactics that threaten consumers' ability to receive local broadcast signals from their chosen MVPD. Mediacom and Suddenlink are two of the leading cable companies focused on serving small communities in the United States and both have first-hand experience with the breakdown of the retransmission consent regime and how it is harming consumers.

Simply stated, the Petition raises two questions: are the Commission's existing rules governing broadcasters' exercise of their retransmission consent rights adequately protecting consumers and, if not, does the Commission have the authority to adopt meaningful reforms to those rules? As the record clearly establishes, the answer to the first question is no, while the answer to the second question plainly is yes. Consequently, the Commission can, should, and, indeed, must proceed to commence the requested rulemaking proceeding.

In weighing the merits of the Petition, the Commission should focus first on what Congress intended and expected when it created the retransmission consent "right." The legislative history of Section 325(b)(1) makes it clear that retransmission consent was not adopted as an end unto itself; rather, it was adopted as part of a comprehensive regulatory scheme intended to guarantee the "universal availability" of free, local, over-the-air broadcasting.

Even as the retransmission consent provision was being considered, a number of members of Congress expressed concern that it could result in higher prices for consumers or result in a loss of consumer access to local stations. The sponsors of the bill responded with repeated reassurances that the Commission had the requisite authority, both under existing law and under

the retransmission consent provision itself, to prevent the exercise of retransmission consent from harming consumers. However, both Congress and the Commission were of the view that the bilateral monopoly that characterized the broadcast-cable relationship in 1992 would keep retransmission consent negotiations in check without the need for significant regulatory intervention.

And, in fact, for the first dozen or so years after the enactment and implementation of the 1992 Cable Act, retransmission consent worked largely as Congress expected and intended. The balance of power between cable operators and local stations typically resulted in retransmission consent agreements that maintained consumers' longstanding access to local stations on the basis of a mutually beneficial exchange of non-cash consideration. However, in the past several years, retransmission consent has ceased to operate in a manner consistent with Congress' objectives and expectations. Instead of furthering the universal availability of free, local, over-the-air television service provided by stations granted use of the public airwaves in return for a commitment to operate in the public interest, retransmission consent has become a vehicle by which broadcasters threaten consumers with a loss of access to their signals in order to force the consumers' preferred MVPD to give in to the broadcasters' escalating demands for cash consideration and other onerous terms. Broadcasters also are using tying arrangements to promote their affiliated non-broadcast cable networks to the detriment of independent programmers and the valuable program diversity that they represent.

The harms to consumers from these tactics are real. Today, broadcasters are using consumers as pawns in order to force MVPDs to give in to demands for cash consideration at levels that cannot simply be absorbed by cable operators and, thus, flow to consumers in the form of higher prices. Moreover, there is a wide consensus among not only MVPDs, but also consumer and public interest groups, community leaders, and elected officials that the widely publicized disputes that served as a catalyst for the filing of the Petition are just the tip of the iceberg. The message is clear: the *laissez-faire* approach adopted by the Commission when it first implemented retransmission consent is no longer working. The Commission needs to update its rules to make sure that they protect the public interest.

For their part, the broadcasters claim that there is nothing broken about the retransmission consent regime – that the retransmission consent crisis is a "myth" manufactured by MVPDs in order to get the Commission to interfere with "free market" transactions. In support of their position, the broadcasters rely heavily on a 2005 report to Congress in which the Commission decided not to propose changes to the statutory provisions relating to retransmission consent. The broadcasters also claim that there is no difference between their exercise of their retransmission consent rights and negotiations between MVPDs and non-broadcast networks and that, in any event, the Commission is expressly barred by Section 325(b)(1)(A) of the Communications Act from adopting regulatory reforms (including dispute resolution and interim relief measures) such as those proposed in the Petition and supporting comments.

The flaw in the broadcasters' first argument is that it ignores the dramatic changes in the regulatory, technological, and competitive landscape that have occurred in the past few years. Those changes (which include regulatory initiatives that have fostered the growth of DBS and wireline competition to cable on the one hand and facilitated an oligopolistic concentration of ownership of broadcast and non-broadcast programming sources in broadcast entities on the other, the digital transition, the Commission's narrow interpretation of the "good faith" negotiation requirement, the increased participation of the big four networks in the local retransmission consent process, and the shift towards cash rather than in-kind compensation) have altered the environment in which retransmission consent is negotiated. Gone is the balance of power that held retransmission consent in check as expected by Congress. Instead, broadcasters effectively hold all the cards and they are playing them aggressively and without regard for the confusion and frustration their scare tactics are causing consumers or the impact of their price demands (heading towards $20 per subscriber per month if some broadcast executives have their way) on consumers' pocketbooks.

The flaw in the broadcasters' second argument is that retransmission consent transactions have never been the product of a "free" market negotiation. Retransmission consent is a unique, statutorily-created "right" in a broadcast signal (as distinct from the content embodied in that signal, which is separately governed by the Copyright Act's compulsory license provisions). It is just one element of a comprehensive regulatory scheme that includes must carry rules, rules guaranteeing favored tier locations, rules guaranteeing broadcasters program exclusivity, and rules governing manner of carriage and deletion or alteration of content, including commercials. Comparisons of retransmission consent transactions to transactions involving non-broadcast networks ignore these broadcast-specific regulatory rights and obligations as well as the fact that agreements to carry a non-broadcast network involve the sale of both transport and content rights for a product that is not available for free over-the-air and that often include advertising time and other terms not available as a matter of law in retransmission consent contracts.

Last, but not least, there is utterly no merit to the broadcasters' argument that the Commission lacks the requisite authority to update its rules governing the exercise of retransmission consent so that they provide meaningful protection to consumers. Section 325(b)(1)(A), unlike other provisions where Congress has expressly limited the Commission's authority to act, simply bars MVPDs from unilaterally carrying certain stations without their consent. It does not in any way restrain the Commission from adopting rules pursuant to its affirmative authority under Section 325(b)(3)(A) (which directs the Commission to adopt regulations governing the exercise of retransmission consent and specifically requires that those rules protect against retransmission consent adversely impacting consumer prices) and Section 309(a) (which gives the Commission broad authority to regulate broadcasters in the public interest, including the broadcast-network relationship) as well as pursuant to its ancillary authority under Sections 201(b), 303(r), and 4(i)). The inescapable conclusion that the Commission has all the authority it needs to take any of the actions that have been proposed, including adopting an interim carriage requirement, is confirmed by reference to the legislative history and to the Commission's own decisions, which confirm that the Commission can and should revisit and update its interpretations and policies to reflect changed circumstances.

Not all regulatory proposals have merit. In particular, several broadcasters have put forward suggestions that the Commission merely adopt a "notice" provision that would require MVPDs to give consumers information about impending service interruptions. Such a requirement would be mere window dressing and would actually exacerbate, rather than address, consumer confusion and frustration. Rather, as signatories to the Petition, Mediacom and Suddenlink endorse meaningful reforms, such as the dispute resolution, interim carriage and restrictions on tying arrangements proposed therein. We also urge the Commission to seek comment on additional proposals, including prohibitions on discriminatory terms and conditions, rules providing greater transparency with respect to retransmission consent agreement, more specific "good faith" standards, particularly with respect to take it or leave it bargaining tactics, and rules that would create a more competitive environment for retransmission consent by requiring that stations that have entered into LMAs or similar relationships negotiate separately for retransmission consent and by restricting the role that networks can play in the retransmission consent process (including limitations on the invocation of network non-duplication rights and on contractual provisions barring an affiliate from granting retransmission consent for out-of-market carriage).

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JOINT REPLY COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION AND CEQUEL COMMUNICATIONS LLC D/B/A SUDDENLINK COMMUNICATIONS

Mediacom Communications Corporation ("Mediacom") and Cequel Communications LLC d/b/a Suddenlink Communications ("Suddenlink") hereby submit their joint reply comments in support of the Petition for Rulemaking ("Petition") in the above-captioned proceeding. Mediacom and Suddenlink, who both are signatories to the Petition, submit these joint reply comments (i) to respond to and rebut various broadcaster comments arguing that there is no need or legal authority for the Commission to update and reform its rules governing the exercise of retransmission consent and (ii) to offer additional proposals for retransmission consent regulatory reform on which the Commission can and should seek comment in a Notice of Proposed Rulemaking.

Mediacom, which operates cable television systems serving approximately 1.3 million subscribers in 22 states and Suddenlink, which operates cable systems serving approximately 1.3 million subscribers in 18 states, are among the leading cable operators focused on serving the smaller cities in the United States. As discussed herein, both Mediacom and Suddenlink (and their respective customers) have been directly and adversely impacted by the systemic breakdown that is occurring in the retransmission consent process.

INTRODUCTION AND BACKGROUND

In enacting the 1992 Cable Act, one of Congress' goals was, in the words of the Act's sponsor, to ensure the "universal availability of local broadcast signals."[1] As a means towards that end, Congress not only granted broadcasters statutory "must carry" rights (thus codifying a regulatory policy that had been the linchpin of broadcast-cable relationships for decades) but also created a new "retransmission consent" right that commercial broadcasters could exercise as an alternative to mandatory carriage. This new right, which was clearly described by Congress as vesting in the local broadcaster's signal, as distinct from the copyrighted programming that was already covered by the cable compulsory license in Section 111 of the Copyright Act, was not an end unto itself. Rather, it was intended to create an opportunity for local stations (not the national networks) to develop a second revenue stream that could be used to support local (not network) programming and, in so doing, guarantee that "our system of broadcasting remains vibrant and not be replaced by a system which requires consumers to pay for television service."[2]

After almost twenty years, the retransmission consent regime no longer is operating in a manner consistent with Congress' objectives and expectations. Instead of providing a mechanism for broadcasters to seek compensation for the value of their signals (independent of the content transported on those signals), retransmission consent has become a way for broadcasters to circumvent the compulsory copyright license. Instead of promoting the universal availability of broadcasting, retransmission consent has become a tool by which broadcasters use consumers as pawns, threatening to deny them access to local stations at the

[1] 138 Cong. Rec. S667 (Jan. 30, 1992).

[2] S. Rep. No. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133.

most inopportune times in order to maximize their already substantial negotiating advantage over MVPDs. Instead of furthering a system in which broadcasters make free use of the public airwaves in return for their provision of a "free television" service, retransmission consent has become a vehicle for broadcasters to charge the public an ever-increasing amount for access to signals that rightly belong to the public, with little or no assurance that broadcasters will reinvest retransmission consent fees to improve their facilities or service. And instead of centering on the needs and interests of local stations and their communities, control over local retransmission consent rights is being usurped by the national networks, who increasingly dictate the negotiating decisions of the local stations in ways that drive up the cost of retransmission consent.

The fact that retransmission consent is threatening rather than serving the goals for which it was created is not entirely surprising. Even at the time the 1992 Cable Act was adopted, some in Congress expressed their concern that retransmission consent could adversely impact the rates consumers paid for cable service and/or consumers' uninterrupted access to local television broadcasts. These concerns were met with repeated assurances that a balance of power existed between cable operators and local television broadcasters that would result in a fair, mutually beneficial exchange of value for retransmission consent. Moreover, according to the sponsors and supporters of the retransmission consent provision, if a broadcaster's exercise of its retransmission consent rights threatened to drive up consumer prices or disrupt service to consumers, the Commission could and would step in to protect the public interest.

For example, during the Senate floor debate on the 1992 Cable Act in January 1992, legislators from both sides of the aisle posed questions to the bill's manager (and author of the retransmission consent provision), Senator Inouye, regarding the possibility that negotiations between a broadcaster and cable operator might reach an impasse resulting in a loss of local programming to consumers. These questions, and Senator Inouye's clear, direct and unambiguous answers, leave no doubt as to Congress' beliefs and expectations regarding the benefits and risks of retransmission consent:

> MR. LEVIN**:** Mr. President, I would like to engage the manager of S.12, Senator Inouye, in a brief colloquy regarding the retransmission consent provision in the bill….The bill directs the FCC to conduct a rulemaking proceeding to establish rules concerning the exercise of stations' rights to grant retransmission authority under the new section 325(b). But, the bill does not directly address the possibility that broadcasters and cable operators in a particular market may be unable to reach an agreement, resulting in noncarriage of the broadcast signal via the cable system. I strongly suggest, and hope that the chairman of the subcommittee concurs, that the FCC should be directed to exercise its existing authority to resolve disputes between cable operators and broadcasters, including the use of binding arbitration or alternative dispute resolution methods in circumstances where negotiations break down and noncarriage occurs, depriving consumers of access to broadcast signals.
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> MR. INOUYE. The FCC does have the authority to require arbitration, and I certainly encourage the FCC to consider using that authority if the situation the Senator from Michigan is concerned about arises and the FCC deems arbitration would be the most effective way to resolve the situation.[3]
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> * * *
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> MR. BURDICK. Mr. President, I would like to pose a question to my colleague, the distinguished Senator from Hawaii, the manager of S. 12 on the Democratic side, for the purpose of engaging in a colloquy….Concerns have been raised about what will happen if a local station is unable to reach an agreement with the local cable operator, which could result in the loss of local programming to subscribers. I am particularly concerned about those consumers who cannot receive all the local broadcast signals without cable. How can we be assured that if retransmission consent negotiations take place, consumers will not lose access to their local programming?
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> MR. ADAMS. Mr. President, I too am concerned about this possibility. If a local broadcast station and a cable operator are unable to come to terms on an agreement to carry that station's signal, some consumers may not be able to receive local programming. For example, in parts of Seattle, the signals of local Seattle stations are not viewable if they are not carried on cable, because of interference problems

[3] 138 Cong. Rec. S667 (Jan. 30, 1992) (emphasis supplied).

> with over-the-air viewing of these signals. <u>How can we be sure that consumers will continue to receive the signals of their local broadcast stations if the local broadcaster and the local cable operator cannot reach agreement on the terms of carriage</u>?
>
> <u>MR. INOUYE</u>. Mr. President, <u>I thank the Senators for raising this very important concern, inasmuch as universal availability of local broadcast signals is a major goal of this legislation</u>. The retransmission consent provisions of S.12 were designed so as to avoid creating a complex set of governmental rules to promote the carriage of local broadcast signals. Instead, S.12 permits the two interested parties – the station and the cable system – to negotiate concerning their mutual interests. <u>It is of course in their mutual interests that these parties reach an agreement: the broadcaster will want access to the audience served by the cable system, and the cable operator will want the attractive programming that is carried on the broadcast signal</u>. I believe that the instances in which the parties will be unable to reach an agreement will be extremely rare. We should resist the urge to require formal, preestablished mechanisms that might distort the incentives of the marketplace. At the same time, there may be times when the Government may be of assistance in helping the parties reach an agreement. <u>I am confident, as I believe other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers. In this regard, the FCC should monitor the workings of this section following its rulemaking implementing the regulations that will govern stations' exercise of retransmission consent so as to identify any such problems. If it identifies such unforeseen instances in which a lack of agreement results in a loss of local programming to viewers, the Commission should take the regulatory steps needed to address the problem</u>. I assure my friend that my colleagues on the committee and I will make certain that the FCC uses its authority to prevent any such impasses from becoming permanent and frustrating the achievement of our goal to maximize local service to the public.[4]

Notably, not a single member of the Senate rose to offer a contrary view to Senator Inouye's statements. Moreover, during the subsequent debate on the 1992 Cable Act's

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[4] *Id*. at S643 (emphasis supplied). The assurances given by Senator Inouye regarding the scope of the Commission's authority to address situations in which the exercise of retransmission consent was adversely impacting the public interest directly led Senator Wellstone to withdraw an amendment that he had intended to offer that would have expressly required the Commission's initial implementing regulations to ensure that the exercise of retransmission consent rights does not cause the loss of service or an increase in rates. *Id*. (Statement of Sen. Wellstone).

Conference Report, several Senators made similar assertions, again without contradiction.[5] This legislative history unmistakably demonstrates that Congress expected the Commission to engage in oversight of the retransmission consent process and to take such action as might be necessary in order to protect the public interest from failures in the retransmission consent process.

The legislative history also demonstrates that Senator Inouye and his colleagues believed that the Commission, while having the authority to intervene in retransmission consent disputes, would rarely need to exercise that authority.[6] Rather, it was assumed that the retransmission consent process would be kept on track by the bilateral monopoly that then existed between broadcasters and cable operators – *i.e.,* the fact that the local broadcaster and the cable operator were the only games in town and thus each had equal need for the other.[7]

Congress' belief that retransmission consent would not result in significant increases in consumer prices and that negotiating impasses would occur rarely if at all was reflected in

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[5] For example, during the Conference Report debate, Senator Wellstone cited assurances given by the Senate Commerce Committee's legal counsel "that <u>existing law provides the FCC with both the direction and authority to ensure that the retransmission consent provision will not result in a loss of local TV service</u>." 138 Cong. Rec. S14604 (Sept. 22, 1992). *See also id*. at S.14224 (Sept. 21, 1992) (Statement of Sen. Inouye); *id*. at S14248 (Sept. 21, 1992) (Statement of Sen. Gorton); *id*. at S14615 (Sept. 22, 1992) (Statement of Sen. Lautenberg).

[6] *See, e.g*., 138 Cong. Rec. S14603 (Sept. 22, 1992) ("I believe that most broadcasters will opt for must-carry while a significant number of other broadcaster will negotiate nonmonetary terms, such as channel position, for the use of their signal . . . the vast majority of cable operators will, in my opinion, not incur significant increases in cost due to the retransmission consent provision.") (Statement of Sen. Bradley).

[7] In a bilateral monopoly, "an upstream monopolist sells its output to a single downstream buyer who may also be a monopolist in its output market." Roger D. Blair, David L. Kaserman & Richard E. Romano, A Pedagogical Treatment of Bilateral Monopoly, 55 S. Econ. J. 831 (1989).

the largely hands-off approach taken by the Commission in its rulemaking orders implementing the 1992 Cable Act. However, recent events plainly illustrate that the balance that both Congress and the Commission originally counted on to ensure that the retransmission consent process operated in a manner consistent with the public interest has been upset in recent years by seismic changes in the competitive, technological and regulatory environment in which retransmission consent negotiations occur. As a result, the exercise of retransmission consent increasingly is putting consumers in harm's way.

More specifically, having developed their businesses on the back of a regulatory regime that gives them free use of the public airwaves and that for decades allowed them to build audience loyalty through mandatory carriage on cable systems, local broadcast stations increasingly are threatening (and on occasion carrying out such threats) to "go dark" in order to force MVPDs to capitulate to their retransmission consent demands. The affected consumers rely, sometimes by choice and sometimes by necessity, on their chosen MVPD service for access to these signals and shutting them down is the antithesis of Congress' goal of preserving the "universal availability" of local television service. And even when shut-downs are averted, the broadcasters' scare tactics are driving up prices and breeding frustration and confusion among consumers.

The opening comments in this proceeding have appropriately focused on the harm to consumers from rising retransmission consent costs and from the threatened (and actual) disruptions in consumers' access to local broadcast television through their preferred MVPD. But broadcasters also are wielding their retransmission consent rights in a manner that is detrimental to the public's interest in program diversity. Congress envisioned retransmission consent as a means for broadcasters to obtain revenues that could be used to make local stations more competitive with non-broadcast cable networks. However, instead of reinvesting retransmission consent fees back into local services and facilities, those fees are being used to purchase national network programming, to create broadcaster-owned cable networks, or simply to fund dividend payments to investors. Independent cable networks – the supposed threat to local broadcasting that retransmission consent was intended to address – are being squeezed by a lack of resources and shelf space that is attributable to the inflated retransmission consent fees being paid to broadcasters and the use of tying arrangements linking carriage of broadcast stations and broadcaster-owned cable networks. It is, of course, the consumer that ultimately suffers when program diversity suffers.

In short, because of the breakdown in the balance of market power that Congress expected would prevent the exercise of retransmission consent from harming the public interest, consumers are paying more for local television stations but receiving less value. Under the circumstances, the time has come for the Commission, carrying out Congress' original intent, to step up and adopt meaningful reforms that will ensure that broadcast television signals remain "universally" available at a price that does not adversely impact consumers.

DISCUSSION

I. The Breakdown in the Retransmission Consent Process and the Resulting Harms to Consumers are Real and Require Commission Action.

A common thread running through the initial comments filed in opposition to the Petition is that the Petitioners have fabricated the "myth" that the retransmission consent process is broken in an effort to persuade the Commission to intervene on their behalf in an evolving, but properly functioning, "free" marketplace.[8] Pointing to a 2005 report to Congress in which the Commission declined to recommend any legislative changes to the retransmission consent regime, these commenters argue that there is no need for the Commission to reform or update its retransmission consent rules beyond, possibly, imposing new "notice" obligations on MVPDs with respect to potential retransmission consent-related service disruptions.[9]

In fact, however, there is nothing fanciful or exaggerated about the Petition's description of the problems that are occurring in the retransmission consent marketplace and the resulting harm to the public. Retransmission consent is a unique, statutorily created "right" in the signal (as distinct from the intellectual property transported by that signal which is separately governed by the Copyright Act's compulsory license provisions) that a broadcast station transmits using a scarce public resource pursuant to a license granted to the broadcaster on condition that such use conforms to regulations established by the Commission to promote and protect the public interest.[10] As just one element of an extensive

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[8] *See, e.g.*, Comments of The Walt Disney Company, MB Docket 10-71, at 1, 2, 22-24 (filed May 18, 2010) ("Disney Comments"); Comments of New Age Media, LLC, MB Docket 10-71, at 1 (filed Apr. 19, 2010) (New Age Comments"); Opposition of the Broadcast Associations, MB Docket 10-71, at iv (filed May 18, 2010) ("NAB et al. Opposition").

[9] *See, e.g.*, Comments of LIN Television Corporation, MB Docket 10-71, at 13-15 (filed May 18, 2010) ("LIN Comments"); Comments in Response to Petition for Rulemaking of CBS Corporation, Fox Entertainment Group, Inc. and Fox Television Stations, Inc., NBC Universal, Inc. and NBC Telemundo License Co., The Walt Disney Company, Univision Communications Inc., MB Docket 10-71, at 5-6 (filed May 18, 2010) ("Broadcast Networks Comments").

[10] Retransmission consent is often referred to as a "property right" by those claiming that Commission regulation would constitute government interference with a "free" market transaction. However, broadcast signals are not "private property" – they are the property of the American people. Broadcasters possess only a license to use that property subject to the regulatory terms and conditions established by the federal government. As the Supreme

regulatory regime established by Congress (and implemented by the Commission) for the benefit of the television viewing public, retransmission consent agreements are not now, nor have they ever been, the product of a "free" market transaction.

Furthermore, while retransmission consent may have functioned relatively smoothly for a time, it did so only because the regulatory, technological and competitive environment in which it operated helped maintain a balance of power between the parties. But the radical transformation of that environment over the past five years has had a significant and, from a consumer perspective, adverse impact on retransmission consent negotiations. The Congressional Research Service, in its 2007 report to Congress, summarized the situation as follows:

> When market conditions that affect the relative negotiating strength of content providers, programmers, and distributors change, the newly strengthened party typically attempts to change the prevailing business model to its advantage. That is happening today. Content providers and programmers are taking advantage of structural market changes favorable to them to pressure MVPDs to make cash payments for programming that until now was available either for free or for non-cash considerations (or, where cash payments have been made in the past, to make higher cash payments).[11]

Congress has given broadcast stations the right to demand that an MVPD obtain the station's consent before retransmitting its signal, but Congress did not strip the Commission of its authority to adopt rules defining how that right may be exercised. The rules adopted by

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Court noted some seventy years ago, "[t]he policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." *FCC v. Sanders Bros. Radio Station*, 309 U.S 470, 475 (1940). This continues to be the policy of the government, as reflected by the express terms of the written license granted broadcasters: "This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein."

[11] Congressional Research Service, Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress at 10 (July 9, 2007).

the Commission in the past are no longer sufficient to protect the public interest. The time has come for the Commission to revisit and make meaningful revisions to those rules.

A. The recent retransmission consent disputes are just the tip of the iceberg.

According to various broadcast commenters, the exercise of retransmission consent rights has rarely resulted in an actual suspension of service to consumers, a fact that they cite as conclusive evidence that the Commission's rules governing the retransmission consent regime are working fine and do not need to be revisited.[12] However, the fact that situations in which broadcasters force an actual shutdown (by refusing to grant even short term extensions) are still the exception rather than the rule is no excuse for the Commission not to address a situation that plainly is spiraling towards a crisis.

First, the fact that most retransmission consent negotiations still are resolved without a service interruption does not mean that consumers are not being adversely impacted by the outcome of those negotiations or the manner in which they are being conducted. Comments from MVPDs, consumer and public interest groups and government officials all confirm that the scare tactics being employed by broadcasters are driving up prices and are sowing confusion and frustration among consumers who are bombarded with messages warning them that they are on the verge of losing local channels that they reasonably expect will be part of their multichannel video service line-up.[13] Independent programmers further note

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[12] *See, e.g.*, Broadcast Networks Comments at iii; NAB et al. Opposition at 7.

[13] *See, e.g.*, Comments of AT&T, MB Docket 10-71, at 6-10 (filed May 18, 2010) ("AT&T Comments"); Comments of Free Press, Parents Television Council, and Consumers Union, MB Docket 10-71, at 1 (filed May 18, 2010) ("Free Press Comments"); Comments of Time Warner Cable Inc., MB Docket 10-71, at 3-10 (filed May 18, 2010) ("TWC Comments"); Letter from Rep. Dan Boren to Chairman Julius Genachowski, MB Docket 10-71 (Apr. 26, 2010) ("Boren Letter"); Letter from Rep. Jo Ann Emerson to Chairman Julius Genachowski, MB Docket 10-71 (Apr. 22, 2010) ("Emerson Letter"); Letter from Rep. Todd Russell Platts

that retransmission consent is drying up the resources and opportunities for networks that are not affiliated with broadcasters and, in particular, not affiliated with the big-four networks.[14] The resultant harm to diversity is yet another way that the public is suffering real harm from the current operation of the retransmission consent regime.[15]

Second, although the widely publicized retransmission consent disputes that occurred between Time Warner Cable and FOX and between Cablevision and ABC over the past several months undoubtedly were a major catalyst for the filing of the Petition, those two situations are just the tip of the iceberg. The record establishes that broadcasters are increasingly making over-the-top demands and engaging in abusive and threatening negotiating tactics in order to force MVPDs to capitulate to those demands.[16] The situation is particularly dire for smaller and medium-sized MVPDs, who are often targeted by

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to Chairman Julius Genachowski, MB Docket 10-71 (Apr. 27, 2010) ("Platts Letter"); Letter from Rep. Harry Teague to Chairman Julius Genachowski, MB Docket 10-71 (May 7, 2010) ("Teague Letter").

[14] *See, e.g.*, Comments of The Africa Channel, MB Docket 10-71, at 1-4 (filed May 18, 2010); Comments of Discovery Communications LLC, MB Docket 10-71, at 10-17 (filed May 18, 2008); Comments of Retirement Living TV, MB Docket 10-71, at 2-3.

[15] As several MVPD commenters point out, progress in meeting the Commission's broadband policy goals also is impeded by the battles that are occurring over retransmission consent and the resulting diversion of resources from broadband deployment and adoption. *See e.g.*, Comments of American Cable Association, MB Docket 10-71, at 10 (filed May 18, 2010) ("ACA Comments"); AT&T Comments at 10.

[16] *See, e.g.*, AT&T Comments at 1; Free Press Comments at 2-3; Comments of Media Access Project, MB Docket 10-71, at 1, (filed May 18, 2010) ("MAP Comments"); Comments of the Office of Advocacy, U.S. Small Business Administration, MB Docket 10-71, at 3-5 (filed May 11, 2010) ("SBA Comments"); TWC Comments at 6-7; Boren Letter; Emerson Letter; Platts Letter; Teague Letter. Indeed, even one broadcaster – Cox Enterprises – which also operates cable systems, acknowledged the need for the Commission to update its rules to address the breakdown of the retransmission consent process. Comments of Cox Enterprises, Inc., MB Docket 10-71, at 2 (filed May 18, 2010) ("Cox Comments").

broadcasters precisely because they have the least ability to resist.[17] Both Mediacom and Suddenlink have first hand experience in this regard.

Specifically, in 2006 and again in 2009, Mediacom faced extreme and discriminatory demands for retransmission consent compensation from Sinclair Broadcast Group ("Sinclair").[18] In both instances, Mediacom filed complaints with the Commission alleging that Sinclair was violating its obligation to negotiate in good faith, citing *inter alia*, Sinclair's "take it or leave it" bargaining tactics, its outrageous price demands, its abuse of market power resulting from unlawful duopoly control over multiple stations in a single market, and other actions that reflected, based on the "totality of the circumstances," a failure to negotiate in a manner consistent with "competitive market considerations" as required by the Commission's rules.[19] Unfortunately, the Media Bureau, adopting an unduly narrow reading of both the good faith standard and the Commission's authority to protect the public interest during the pendency of a retransmission consent complaint proceeding, declined to intervene.[20] The 2006 dispute ended up with Sinclair denying access to 22 of its signals to over 700,000 Mediacom subscribers in 12 states for a month. In 2009, a similar disruption of service appeared imminent, but was averted when Mediacom essentially gave in to Sinclair's extortionate threats.

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[17] *See, e.g.*, ACA Comments at 4-9; Opening Comments by The American Public Power Association et al., MB Docket 10-71, at 13 (filed May 18, 2010) ("APPA Comments"); Comments of Pioneer Communications et. al., MB Docket 10-71, at 4-7 (filed May 18, 2010) ("Pioneer Comments").

[18] The history and extensive record of Mediacom's two retransmission consent disputes is detailed in the Commission's public files (CSR-7058-C and CSR-8233-M).

[19] *See* 47 C.F.R. § 76.65.

[20] *See Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, 22 FCC Rcd 35 (MB 2007) ("*Mediacom v. Sinclair*").

Suddenlink also has direct experience with the failings of the current rules governing retransmission consent. Again, the broadcaster in question was Sinclair. As Suddenlink described in comments filed in the Commission's 2006 "Quadrennial Review Proceeding," Sinclair informed Suddenlink in July 2006 that it wanted Suddenlink to agree to make "upfront" and recurring payments adding up to more than $7 per subscriber per month for the right to continue to provide customers with the signals of the Charleston, West Virginia affiliates of ABC (licensed to Sinclair) and FOX (licensed to Cunningham Broadcasting Corp. (through their subsidiary WVAH Licensee LLC), but controlled by Sinclair pursuant to what it described as a "grandfathered time brokerage agreement").[21]

Suddenlink responded to Sinclair's outrageous demands – which would have required the payment of retransmission consent fees for two stations equivalent to the aggregate programming costs of more than 75 other channels offered on the affected cable systems – by filing an "Emergency Retransmission Consent Complaint" with the Commission.[22] However, Sinclair's exercise of control over the retransmission consent rights of two big-four network stations in a single market (in obvious derogation of the policies underlying the Commission's duopoly rules) left Suddenlink with no leverage to pursue that complaint to its conclusion; instead, after having to shut down many of its customers' access to Sinclair's

[21] *See* Comments of Cequel Communications, LLC d/b/a Suddenlink Communications, MB Docket 06-121 (filed Oct. 23, 2006). More specifically, Sinclair demanded that Suddenlink pay it an upfront fee of $200 per subscriber (equaling roughly $40 million) plus an additional recurring fee of $1 per month per subscriber.

[22] *Id*. In response to Suddenlink's complaint, Sinclair threatened legal action against Suddenlink for continuing to carry the stations during the July "sweeps" period notwithstanding unambiguous Commission precedent barring Suddenlink from dropping local broadcast signals in such a circumstance. *Id*.

stations for a brief period, Suddenlink essentially was compelled to accept Sinclair's settlement terms.[23]

Sinclair and other broadcasters dismiss the significance of experiences such as those described above. Instead, they claim that the disruption to consumers resulting from these disputes is, at most, temporary, that consumers can engage in self-help by shifting to a different MVPD or to over-the-air reception, and that when a disruption in service occurs, blame should be placed on the MVPD, not the station.[24] But attempts by the broadcast commenters to deny that the current retransmission consent regulatory regime is harming consumers or to duck responsibility for that harm cannot be squared with the dozens of statements and letters that the Commission has received in recent years from elected officials at the federal, state, and local level and from community leaders and consumer representatives, all urging the Commission to address the harm incurred by consumers due to the broadcasters' outrageous demands and brinksmanship tactics.[25] Chairman Genachowski himself acknowledged the reality of the problem in his remarks last month to the NAB convention, expressing concern about the "sudden program interruptions, and about the potential for rising cable rates" and asking "is 'free TV' really free when cable rates go up because of retransmission fees?"[26]

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[23] *Id*.

[24] *See, e.g.*, Broadcast Networks Comments at 5; Comments of Sinclair Broadcast Group, Inc., MB Docket 10-71, at 6 (filed May 18, 2010); NAB et. al. Opposition at 28-29.

[25] *See, e.g.*, Boren Letter; Emerson Letter; Platts Letter; Teague Letter.

[26] Julius Genachowski, Chairman, Federal Communications Commission, Remarks at NAB Show 2010 (April 13, 2010), *available at* http://www.fcc.gov/commissioners/genachowski/speeches2010.html.

Finally, it is not necessary for a problem to have become widespread before the Commission can or should address it. The broadcasters are well aware of this fact. In the 1980s, after the courts had struck down the Commission's must carry rules, it was the broadcasters who demanded that the Commission adopt new rules notwithstanding the fact that cable operators continued to carry the vast majority of local stations even in the absence of a regulatory obligation to do so. As a number of commenters have observed, the retransmission consent disputes alluded to by Chairman Genachowski are harbingers of things to come.[27] This is particularly the case in light of declarations by leading broadcast executives of their intent to seek levels of retransmission consent compensation that could add as much as $20 per month to the basic subscriber's bill in the next few years.[28] As TWC pointed out in its opening comments, whether MVPDs fight those demands (leading to service disruptions) or give in to them (leading to rate increases), it will be the consumer that suffers unless the Commission acts to reform the current rules.[29]

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[27] *See, e.g.*, Free Press Comments at 1-2; MAP Comments at 4-5; TWC Comments at 1-2; Comments of the United States Telecom Association, MB Docket 10-71, at 3 (filed May 18, 2010).

[28] While some commenters downplay the magnitude of the retransmission consent fee increases that have occurred in the past few years, it is clear that many broadcasters expect the trend of rising fees to continue to escalate over the next few years. The articulated goal of leading broadcast executives is for retransmission consent fees for big-four stations to reach levels that equal or exceed those of the most expensive basic cable networks, such as ESPN. At least one executive has pegged $4.50 per subscriber per month as a possible price point for retransmission consent. "*Retrans Fiasco: MSOs Could Pay $4.50/Sub for Broadcast Stations*," CableFAX Daily, March 1, 2006, at 1. When the dollar or more that the networks have started demanding from their affiliates is added in, twenty dollars a month for a full slate of network affiliates is not an unreasonable estimate of what broadcasters expect to get from MVPDs and their customers.

[29] TWC Comments at 6.

B. The growing problems with the retransmission consent process are not merely the product of an evolving "free" or "competitive" market.

As noted above, several broadcast commenters defend the *status quo* by pointing to the Commission's 2005 report to Congress wherein it was determined that no changes to the retransmission consent regime were then needed.[30] However, one would have to be living in a cave to claim (as at least one set of broadcasters has) that "nothing has changed since 2005."[31] The past five years have been marked by an upheaval in the technological and regulatory landscape that has impacted the competitive environment in which retransmission consent negotiations occur. Those changes have had a direct and unsettling impact on the balance of power underlying the Commission's implementation of the retransmission consent regime.

1. Changes in the regulatory landscape.

To the extent that retransmission consent negotiations can be described as comprising a "marketplace," it is a marketplace that is anything but "free." Retransmission consent is part of a comprehensive regulatory structure adopted by Congress not to enrich broadcasters but rather to help preserve free, over-the-air local broadcast television service. In particular, it was not Congress' goal to convert local stations into the equivalent of cable networks; rather, it was to maintain the distinction between "free" television and "pay" television.

The other elements of this regulatory regime include not only the various rules arising out of the statutory obligation imposed on broadcasters to meet the needs and interests of their local communities (including various rules governing the local affiliate-network relationship) but also, in the case of the relationship between broadcasters and cable

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[30] *See, e.g.*, Broadcast Networks Comments at 5-6; LIN Comments at 13-15.

[31] Broadcast Networks Comments at 4.

television systems, the must carry rules;[32] the "must buy" rule;[33] restrictions on carrying a local broadcast signal for less than the entire program day;[34] prohibitions against dropping or repositioning a local station during "sweeps" periods;[35] network non-duplication,[36] syndicated exclusivity[37] and sports blackout rules;[38] and specific rules governing signal quality[39] and the carriage of program-related material in a station's vertical blanking interval.[40] Moreover, a broadcaster's limited statutory retransmission consent right to control the use of its signal operates contemporaneously with the cable compulsory copyright license, which gives cable operators the right to "secondarily transmit" all of the program content embodied in that signal without needing to obtain consent from either the creator or the broadcast station licensee of that content.[41]

Under the circumstances, it is absurd to claim that retransmission consent negotiations occur in a "free" market or (as the broadcasters repeatedly do in their comments) to equate broadcast retransmission consent with the market for non-broadcast cable

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[32] *See* 47 U.S.C. § 534; 47 C.F.R. § 76.56.

[33] 47 U.S.C. § 543(b)(8); 47 C.F.R. § 76.921.

[34] 47 C.F.R. § 76.62(a).

[35] 47 U.S.C. § 534(b)(9); 47 C.F.R. § 76.1601 n.1.

[36] 47 C.F.R. §§ 76.92-76.95.

[37] *Id.* §§ 76.101, 76.103, 76.105, 76.106.

[38] *Id.* § 76.111.

[39] 47 U.S.C. 534(b)(3); § 47 C.F.R. § 76.62.

[40] *Id.*

[41] *See* 17 U.S.C. §§ 111, 119, 122.

networks.[42] Non-broadcast cable networks do not have the wide array of regulatory advantages described above nor do they have the special public interest obligations – including the 'heightened duty" to negotiate retransmission consent in good faith – that apply to broadcasters because of their free use of the public airwaves. In purely economic terms, the markets for broadcast retransmission consent and non-broadcast cable networks differ because of various differences in the products, such as the free, over-the-air availability of broadcast stations, the fact that transactions for the carriage of non-broadcast networks involve the sale of both transport and content rights, while retransmission consent only involves transport (since the content already is licensed under the compulsory license provisions of the Copyright Act), and the fact that cable networks can and do provide MVPDs with advertising avails while the insertion of advertising by an MVPD into broadcast signals is barred by both the Communications Act and the Copyright Act.[43]

And just as it would be absurd to pretend retransmission consent transactions occur in a free market or are identical to transactions involving non-broadcast networks, it would be absurd to ignore the impact of the numerous changes in the regulatory environment that have occurred in recent years and how they have upset the balance that Congress and the Commission previously counted on to keep retransmission consent disputes and disruptions in check. The regulatory developments that have occurred since the 2005 report was prepared and that have had a significant impact on the retransmission consent "market" include the following:

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[42] *See, e.g.*, Disney Comments at 1, 2, 22-24; New Age Comments at 1; NAB et al. Opposition at iv.

[43] 17 U.S.C. §§ 111(c) (prohibiting alteration of broadcast program content by cable system), 122(e) (same for satellite); 47 U.S.C. § 534(b)(3) (requiring carriage of station's entire program schedule).

The promotion of DBS and wireline competition to incumbent cable operators. It was not until the enactment and implementation of the "local-into-local" provisions of the Satellite Home Viewer Improvement Act of 1999 ("SHVERA") that DBS operators were able to offer competition to cable for the retransmission of local broadcast stations. While this action occurred over a decade ago, it took several years for DBS to begin offering local-into-local service in most of the nation's DMAs. Indeed, at the time the Commission prepared its 2005 report to Congress, the DBS industry had only been through a single retransmission consent election cycle, conducted before DBS local-into-local service was widely available; in contrast, by the time of the most recent election cycle (for the three-year period starting January 1, 2009), both DirecTV and Dish had begun offering local stations to the vast majority of households passed by cable.[44] The Commission has recognized that expansion of local-into-local service has played a key role in the emergence of DBS as a competitive alternative to cable.[45]

In addition, just as the enactment and implementation of SHVERA fueled the growth of the DBS industry, other recent changes in regulatory policy, including the enactment of state franchising laws and the Commission's adoption of its *Cable Franchising Order*, have facilitated the entry into the MVPD market of well-funded wireline competitors such as AT&T and Verizon.[46] These governmental efforts to foster competition to cable by DBS and

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[44] *See Annual Assessment of the Status of Competition in the Market for he Delivery of Video Programming*, Thirteenth Annual Report, 47 CR 1, FCC 07-206, ¶ 12 (2009) ("*Thirteenth Video Competition Report*").

[45] *See Annual Assessment of the Status of Competition in the Market for he Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2539-40 (2006).

[46] *See, e.g.*, Cal. Pub. Util. Code § 5810 (California state franchise law); Fla. State. § 610.104 (Florida state franchise law); M.C.L. § 484.3302 (Michigan state franchise law); *see also*

telcos have led to a dramatic decline in cable's share of the MVPD market.[47] That decline has, in turn, substantially increased broadcasters' leverage in retransmission consent negotiations by making it possible for a local station to play off one competitor against another (or to make side arrangements with one competitor such as the "bounty" payment schemes employed by Sinclair in its 2006 retransmission consent disputes with Mediacom and Suddenlink).

The fostering of an oligopolistic market of programming sources dominated by the big four networks and a few large multiple station owners by virtue of the relaxation and loose enforcement of national and local broadcast ownership restrictions. Just as the adoption of new government policies in recent years has led to robust competition in the MVPD marketplace, so too has government action (or, in some instances, inaction) helped promote concentration in the ownership of broadcast stations and non-broadcast cable networks in the hands of a declining number of broadcast entities. With respect to both national and local ownership limits, Congress and the Commission have

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Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007) ("*Cable Franchising Order*").

[47] In 1992, cable's share of the MVPD market was 95.55 percent. *See Annual Assessment of the Status of Competition in the Market for he Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd 2060, 2180 (1995). By December 2002 (the most recently completed retransmission consent cycle at the time the Commission prepared its 2005 report), cable's share had dropped to 69.41 percent. *Thirteenth Annual* Report, Appendix B, Table B-1. As of December 2008, cable's share of the MVPD market had declined further to below 64 percent. *See* Comments of National Cable & Telecommunications Association, MB Docket 07-269, at 8 (filed May 20, 2009).

opened the door for entities to control more stations.[48] And the big four national broadcast networks have become the four largest owners of basic cable networks.[49]

Changes in the Commission's rules governing local broadcast duopolies, along with loose enforcement of those rules with regard not only to LMAs but also to new types of arrangements (such as shared services agreements and joint sales agreements) have had the effect of encouraging more broadcasters to seek common control over multiple stations in a market. While the Commission first acted to relax the local ownership rules in 1999, many of the new arrangements being utilized to get around the rules did not appear on the scene until 2004 and thus did not begin to have a significant impact on retransmission consent negotiations until after the Commission completed its 2005 report.

As described above, both Mediacom and Suddenlink have experienced first-hand how a broadcaster's control of multiple stations in a single DMA, particularly multiple affiliates of the big-four networks, allows that broadcaster to game the retransmission consent system to its own benefit – not to the benefit of the public. Indeed, Suddenlink has examined its own retransmission consent agreements and found that duopoly control over the retransmission

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[48] *See* Telecommunication Act of 1996, Pub. L. 104-104, 110 Stat. 110, title II, § 202, Feb. 8, 1996; *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010 (2008).

[49] Government Accountability Office, *Media Programming: Factors Influencing the Availability of Independent Programming in Television and Programming Decisions in Radio*, at 14-17 (March 2010). Some analyses of broadcast ownership of non-broadcast programming exclude the cable networks owned by Viacom since Viacom was spun off from CBS at the end of 2005. However, Viacom and CBS continue to share the same majority owner, National Amusements, Inc. Moreover, much of Viacom's stable of non-broadcast cable networks was developed prior to the spin-off.

consent rights of more than one station in a single market drives up the retransmission consent fees paid by Suddenlink and ultimately by its customers.[50]

The broadcast digital transition. Another recent regulatory (and technological) development that has altered the environment in which retransmission consent negotiations take place is the broadcast digital transition, which was completed on June 12, 2009. Prior to the transition, one of the elements of the balance of power between broadcasters and MVPDs in retransmission consent negotiations was the ability of an MVPD to offer consumers a simple set-top ("rabbit ear") antenna that could be used to receive local signals over-the-air in the event that the MVPD was forced to cease retransmissions of the station's signal. Mediacom employed this approach during its 2006 retransmission consent dispute with Sinclair, distributing 133,000 antennas to consumers at its own expense.

With the completion of the digital transition, however, consumers now face much more significant obstacles to receiving over-the-air signals. First, a station's digital signal may not reach some consumers who were able to pull down an acceptable analog signal with an inexpensive set of rabbit ears. In some instances, the consumer might be able to receive the digital signal, but only by installing a costly rooftop antenna. In other instances, because of the digital signal "cliff effect" (*i.e.*, the total loss of a digital signal beyond certain areas

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[50] For example, Suddenlink found that where a single entity controls retransmission consent negotiations for more than one big-four network station in a single market, Suddenlink's average retransmission consent fees for such entity's big-four stations is 21.6% higher than the average retransmission consent fees Suddenlink pays for other big-four stations in those same markets. Moreover, Suddenlink also found that because group owners typically negotiate rates for all of their stations on a joint basis, the ability of broadcasters with duopoly control of multiple stations in a single market to command above-market rates extends to additional markets in which the broadcaster controls only a single station. Suddenlink estimated that this "duopoly premium" produces retransmission consent fees that are nearly higher 40 percent higher than the fees it pays broadcasters without such duopoly control of retransmission consent rights.

that might have received a watchable analog signal), a consumer may install a rooftop antenna only to find that he or she still cannot receive any over–the-air reception and that the only option is to rely on an MVPD for access to the local station.

Second, for many consumers, the equipment needed to receive a broadcast station's digital signal over-the-air will include not only a rooftop antenna, but also a digital-to-analog converter. While such devices were available with a $40 government rebate during the transition, many consumers elected not to obtain them for analog sets that were connected to an MVPD, heeding government-required notices informing them that they did not need to do anything in order to be assured of uninterrupted access to their local stations. Now the rebate coupon program has expired and few retail electronics outlets stock digital-to-analog converters in quantity.

The Commission's narrow interpretation and enforcement of the good faith retransmission consent requirement. The last, but not least, of the regulatory developments that have upset the balance of power that previously characterized most retransmission consent negotiations is the Commission's refusal to intervene in retransmission consent disputes to protect consumers from being held hostage to broadcasters' price gouging demands for retransmission consent compensation. In both of Mediacom's disputes with Sinclair, the Commission had the opportunity to send the message that the consumers' interests come first. Instead, the Commission effectively sat on its hands, even after more than 700,000 customers lost access to local broadcast signals during the height of the college football bowl season and the NFL playoffs.

By taking an almost totally *laissez-faire* approach to the good faith rules, the Commission has sent the message to broadcasters that, when it comes to retransmission consent, "anything goes." For example, the Commission has essentially abdicated its responsibility to enforce the "totality of the circumstances" standard (which, among other things, allows the Commission to intervene when a broadcaster's terms are "sufficiently outrageous")[51] and has failed to give any meaning to the "competitive marketplace considerations" standard (which is key to determining the lawfulness of a broadcaster's insistence on discriminatory terms and conditions for retransmission consent).[52] The Commission also has refused to order interim carriage while a good faith complaint is pending, even though doing so would not harm any broadcaster and would clearly prevent harm to the public – the ordinary test for granting interim relief.[53]

2. Other developments occurring subsequent to the 2005 report.

In addition to the regulatory changes that have played a role in transforming the playing field for retransmission consent from the balanced environment that existed when Section 325(b) was enacted to an environment in which broadcasters are able to coerce MVPD acquiescence to their demands by threatening to disrupt consumers' access to local broadcast stations, the Commission needs to take account of two other developments that have occurred since it prepared its 2005 report to Congress.

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[51] *Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, 15 FCC Rcd 5445, 5458 (2000) ("*Good Faith Order*").

[52] *See* 47 C.F.R. § 76.65.

[53] The Commission uses a four part test for evaluating a request for preliminary injunctive relief: (i) whether the complainant is likely to prevail on the merits of its complaint; (ii) whether the complainant will suffer irreparable harm absent a stay; (iii) whether grant of a stay will not substantially harm other interested parties; and (iv) whether the public interest favors grant of a stay. *Sky Angel U.S., LLC Emergency Petition for Temporary* Standstill, DA 10-679 (MB 2010) (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977); *Hispanic Information and Telecomm. Network, Inc.*, 20 FCC Rcd 5471, 5480 (2005)).

The increased participation of the national broadcast networks in the local retransmission consent process. As detailed in the Petition and in several of the comments filed by MVPDs in response thereto, the national broadcast networks are playing an increasingly prominent role in the retransmission consent process.[54] Among other things, the big-four networks routinely insist that their affiliates forego their right to grant retransmission consent for out-of-market carriage even though that right vests in the station's signal and is completely separate and apart from the network's copyright interest in the programming it provides to its affiliates (programming that is already licensed for use by MVPDs pursuant to the terms of the cable and satellite compulsory license provisions in the Copyright Act). These agreements effectively allow broadcasters to circumvent both the Copyright Act and the geographic limitations in the Commission's network non-duplication rules. The networks also are contributing to the rapid escalation in retransmission consent fees by insisting on a share of any retransmission consent compensation received by their affiliates.[55]

Mediacom itself encountered the growing influence of the networks on the retransmission consent process during its negotiations with Sinclair at the end of 2009. After months of discussions over the terms of a standard multi-year agreement, Mediacom was blindsided by Sinclair's announcement that it no longer would consider entering into an agreement lasting more than one year for its FOX affiliates. This last-minute change in

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[54] *See, e.g.*, Comments of Cablevision Systems Corporation, MB Docket 10-71, at 9-10 (filed May 18, 2010) ("Cablevision Comments"); Cox Comments at 5-8; TWC Comments at 8-9.

[55] *See, e.g.*, Katy Bachman, Sinclair renews affiliation with ABC, Mediaweek, Mar. 28, 2010, *available at* http://www.hollywoodreporter.com/hr/content_display/television/news/e3i82424a74b1dd91192c20ca97a964d0de (describing Sinclair's payment of a licensing fee to ABC that was "based in part on retransmission consent revenue").

position, Sinclair explained, was dictated by FOX, which also was making demands for a share of Sinclair's retransmission consent consideration.

As is apparent from Mediacom's experience as well as the experiences of Time Warner Cable and others, the involvement of the national broadcast networks in the retransmission consent process is adversely impacting that process both by driving up rates and by forcing parties to reach shorter agreements. What is particularly troubling about this development is that it is plainly at odds with the clear intent of Congress that retransmission consent be exercised by and for the local affiliate, not the national networks.

For example, Senator Inouye, speaking on the floor of the Senate during the debate on the 1992 Cable Act, could not have been clearer, stating "<u>The retransmission provisions of S.12 will permit local stations, not national networks . . . to control the use of their signals.</u>"[56] Statements by other members of Congress reflect the same intent: "The intent of the [retransmission consent] amendment was to give bargaining power to local broadcasters when negotiating the terms of cable carriage – not to serve as a subsidy for major networks"[57] and "The right to retransmission consent . . . is a local right. This is not, as some allege, a network bailout for Dan Rather or Jay Leno. Networks are not a party to these negotiations, except in those few instances where they own local stations themselves."[58]

The shift towards cash rather than in-kind compensation. Another development that clearly differentiates the retransmission consent environment assessed by the Commission in its 2005 report and the environment that exists today is that in 2005 the

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[56] 138 Cong. Rec. S562-63 (Jan. 29, 1992).

[57] 138 Cong. Rec. H6493 (July 23, 1992) (Statement of Rep. Chandler).

[58] 138 Cong. Rec. H6491 (July 23, 1992) (Statement of Rep. Callahan).

Commission found that cash payments were not a principal form of retransmission consent and that "virtually all retransmission consent agreements involve a cable operator providing in-kind consideration to the broadcaster."[59] Today, broadcasters not only are demanding cash consideration, they are demanding it at levels that cannot simply be absorbed by cable operators and, thus, flow to consumers in the form of higher prices.

In Mediacom and Suddenlink's experience, the reason that retransmission consent negotiations were generally amicable prior to 2005 was because both the broadcaster and the MVPD were willing to seek out alternative forms of consideration that gave value to both sides, such as carriage of an additional service, advertising and marketing agreements, and other forms of non-cash consideration.[60] Indeed, the Commission's *Good Faith Order* specifically singled out the refusal to consider alternative forms of consideration as an example of actionable bad faith in retransmission consent negotiations.[61] Today, however, the spirit of cooperation that marked earlier retransmission consent cycles has given way to a hard-nosed refusal on the part of many broadcasters to continue to accept non-cash forms of consideration as at least a part of the agreement. It was precisely such a refusal to consider a

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[59] Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, at 7 (Sept. 8, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf.

[60] As noted in the Petition, in addition to abusing their right to demand cash payments, broadcasters also have become more aggressive in their demands for the carriage of additional services, not in lieu of cash, but in addition thereto. Moreover, broadcasters increasingly engage in *de facto*, if not *de jure*, tying of additional services to their broadcast signals by pricing the individual services at a prohibitive level *vis-à-vis* the package. The effect is to force the MVPD to make a "take it or leave it" choice with respect to the broadcaster's bundled offer.

[61] *Good Faith Order*, 15 FCC Rcd at 5463.

reasonable allocation of cash and non-cash consideration that led in large part to Mediacom's 2009 dispute with Sinclair.

What makes the broadcasters' escalating demands for an increasing level of cash payments for retransmission consent even more troubling is that there is scant evidence that the payments are being reinvested to improve the quality of local stations, as Congress clearly intended. Indeed, some of the station groups that have been among the most aggressive in pursuing hyper-inflationary increases in retransmission consent payments have well-documented records of cutting costs when it comes to locally-oriented news and information programming.[62] These groups apparently are using the retransmission consent fees they extort from cable systems not to benefit the public as Congress expected and intended, but rather to fund executive salaries or pay dividends to their investors.[63]

C. The Commission Needs to Adopt Meaningful Retransmission Consent Reforms, Not Changes That are Mere Window Dressing.

As the discussion above demonstrates, a number of dramatic changes have occurred in the regulatory, technological and competitive landscape surrounding retransmission consent over the past five years. The one thing that has not changed is that local broadcast

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[62] The cutbacks occurring in the resources devoted to local news are detailed in the record of the Commission's currently pending examination of the *Future of Media and Information Needs of Communities in a Digital Age*, GN Docket No. 10-25. *See also, e.g.*, Comments of Communications Workers of America and Media Council Hawai'i, GN Docket 10-25 (filed May 7, 2010); Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc., Retransmission Consent Complaint, CSR-8233-C, at 20 (filed Oct. 22, 2009) ("*Mediacom 2009 Complaint*"); Michael Malone, *WYOU Scraps News*, Broadcasting and Cable, April 3, 2009 available at http://www.broadcastingcable.com/article/191255-WYOU_Scraps_News.php?rssid=20065; Russ Tarby, *WTVH Lays Off News Staff, Merges With WSTM 3*, CNYlink, March 3, 2009, *available at* http://www.cnylink.com/cnynews/view_news.php?news_id=1236090530.

[63] For example, in recent years Sinclair has paid out $168 million in dividends while collecting $154 million in retransmission consent payments. *See Mediacom 2009 Complaint* at 23.

stations continue to be the only option for certain “must have” programming in the station’s designated market area. The result is an environment that allows broadcasters not only to demand unreasonable retransmission consent terms and conditions from MVPDs, but also to use consumers as pawns in order to force MVPDs to agree to their demands. Yet, the Commission’s rules governing the exercise of retransmission consent have not kept up with these changes. As a result, instead of benefiting from retransmission consent as Congress expected, consumers are being harmed by high prices and by threatened and actual service disruptions.

It is thus apparent that there is a problem that the Commission must address. The broadcasters, however, argue that the Commission’s hands are tied – that it lacks the legal authority to update and reform its current rules governing the exercise of retransmission consent.[64] At most, these commenters suggest, the Commission can attempt to assist consumers in navigating the perils posed by retransmission consent disputes by imposing on MVPDs new “notice” rules.[65] In the sections that follow, Mediacom and Suddenlink will discuss in detail the Commission’s authority to adopt meaningful retransmission consent reforms and will lay out several ideas that the Commission should consider exploring in a rulemaking proceeding. Before turning to those matters, however, we want to briefly address the broadcasters’ notice proposal.

The broadcasters’ notice proposal is, to describe it kindly, mere window dressing designed not to help consumers but rather to formalize and legitimatize the fear mongering that broadcasters use as a negotiating tactic. As Mediacom and Suddenlink know, again from

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[64] *See, e.g.*, Broadcast Networks Comments at 7-11; NAB et al. Opposition at 62-74.

[65] *See, e.g.*, Broadcast Networks Comments at 5-6; LIN Comments at 13-15.

first hand experience, it is not an "information gap" that is harming consumers in retransmission consent disputes. Cable operators already are required to give consumers 30 days advance notice before a retransmission consent agreement is scheduled to expire.[66] More significantly, as part of their strategy to force MVPDs to capitulate to their demands, broadcasters routinely bombard consumers with on-screen messages and crawls as well as newspaper ads warning of an "imminent" interruption of service and describing alternative ways that consumers can try to get the station's signal. And competing providers themselves often weigh in with advertising campaigns aimed at getting consumers to switch services, sometimes entering into arrangements with the local broadcaster that have the effect of encouraging the broadcaster to engage in even more aggressive bargaining. These tactics leave the consumer scared, confused and often tricked into making a costly and sometimes unnecessary decision to drop their existing MVPD service and subscribe to a new provider or install over-the-air reception equipment.

Of course, it is easy for broadcasters to suggest that the way to deal with disruptive retransmission consent disputes is for the Commission to encourage consumers to seek out alternative means of accessing the station's signal – after all, it is not the broadcaster that has to take time off from work to switch service providers or install costly over-the-air reception equipment and it is not the broadcaster that might end up committing to a year's service from a new provider only to find out a few weeks or months later that a dispute involving the same broadcaster or another broadcaster in the same market is now threatening its current provider's ability to deliver a local signal. The broadcasters' notice proposal also ignores the fact that consumers generally make purchasing decisions with respect to MVPD service

[66] 47 C.F.R. § 76.1601.

based on factors unrelated to retransmission consent, such as on-demand and high definition programming choices, customer service, high speed data and voice options and bundled service discounts[67] Mediacom and Suddenlink understand why the notice proposal might have surface appeal to the Commission – it imposes little or no burden on the agency. But it also does nothing to help consumers. In fact, it shifts the burden of dealing with the failures of the Commission's current retransmission consent rules to the one party that should not bear that burden – the consumer. We strongly urge the Commission to reject notice-based "solutions" and to focus on real, meaningful reforms as described herein.

II. The Commission Has the Authority to Update and Reform Its Rules Governing the Exercise of Retransmission Consent in Order to Protect the Public Interest.

The second thread that runs through most of the comments opposing the Petition is the argument that the Commission lacks the requisite legal authority to regulate how retransmission consent negotiations are conducted and resolved. The broadcast commenters declare with utter certainty that Section 325(b)(1)(A) – which states only that "No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except with the express authority of the originating station" – unambiguously bars the Commission from adopting rules such as those proposed by the Petition.[68] However, the relevant statutory language, legislative history, and case law

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[67] Not all MVPDs offer the same service options. For example, DBS providers do not offer the types of "triple play" packages (video-data-voice) that have proven to be popular with many consumers.

[68] *See, e.g.*, Broadcast Networks Comments at 7-11; NAB et al. Opposition at 62-74. NAB et al argues not only that Section 325(b)(1) bars the Commission from adopting retransmission consent dispute resolution mechanisms, but also that the Commission is precluded for requiring the parties to submit to arbitration under the terms of the Alternative Dispute Resolution Act (ADRA). NAB et al. Opposition at 74. However, the Commission has held that the ADRA does not bar mandatory arbitration where either party may seek *de novo*

all compel a much broader interpretation of the scope of the Commission's authority with respect to retransmission consent.

A. Section 325(b)(1)(A) is not an "unambiguous" prohibition against Commission regulation of the retransmission consent process.

The broadcast commenters read the words of Section 325(b)(1)(A) as if they said "the Commission may not regulate the conduct of retransmission consent negotiations or adopt any dispute resolution procedures, including binding arbitration or orders for interim carriage pending resolution of a dispute." But that, of course, is not what the statute says. Rather, it merely says that cable operators and other MVPDs may not retransmit a broadcasting station without that station's "express authority." Thus, on its face, Section 325(b)(1)(A) does not expressly restrict the Commission from ordering a station, as a temporary or remedial measure, to give its "express authority" to an MVPD or to otherwise deem such express authority to have been given by operation of law.

The fact that the statute does not contain an express prohibition on the Commission's general or specific authority with regard to the exercise of retransmission consent is significant. When Congress intends to restrict or otherwise limit the scope of the Commission's authority to regulate, it knows how to express that intent. For example, in Section 623(a)(1) of the Communications Act (as amended by the 1992 Cable Act), Congress expressly declared that "No Federal agency . . . may regulate the rates for the provision of cable service except to the extent provided under this section and section 612."[69] Similarly,

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review of the arbitrator's decision. *See, e.g.*, *Comcast Corporation, Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, Order, 22 FCC Rcd 17938 at n.13 (2007); *Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd 15783, ¶¶ 52-53 (MB 2008).

[69] 47 U.S.C. § 543(a)(1).

Section 623(e)(1) states that “no Federal agency . . . may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts.”[70] And in Section 624A(b)(2), Congress used the following words to restrict the Commission from adopting certain rules relating to the use of scrambling or encryption technology: “the Commission shall not limit the use of scrambling or encryption technology where the use of such technology does not interfere with the functions of subscribers’ television receivers or video cassette recorders.”[71]

There is a world of difference between the provisions cited above and Section 325(b)(1)(A). The former are unambiguous restrictions on the Commission’s regulatory authority. The latter most decidedly is not. Admittedly, neither Section 325(b)(1)(A) or anything else in the Communications Act expressly declares that the Commission <u>may</u> adopt retransmission consent dispute resolution or interim carriage requirements; but that silence does not divest the Commission of the authority to act pursuant to authority granted to it elsewhere in the Communications Act.[72] At most, it confirms that the scope of the Commission’s authority can be determined only by considering the statute as a whole, its legislative history, and the relevant case law. There can be no question, based on these traditional sources of statutory construction, that Congress intended the Commission to have and exercise broad regulatory authority over the retransmission consent process.

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[70] *Id.* § 543(e)(1).

[71] *Id.* § 544a(b)(2).

[72] *See, e.g.*, *Alliance for Community Media v. FCC*, 529 F. 3d 763, 774 (6th Cir. 2008).

B. The plain language of Section 325(b)(3)(A) and other provisions support the conclusion that the Section 325(b)(1)(A) does not constitute a bar on the adoption of rules addressing the conduct and resolution of retransmission consent negotiations.

The starting point for interpreting Section 325(b) as it relates to the Commission's authority to regulate the conduct and resolution of retransmission consent negotiations is the statutory language of that section. First and foremost, Section 325(b)(3)(A) expressly directs the Commission "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection. . . ."[73] As discussed in the Petition and in a number of the comments supporting the Petition, Section 325(b)(3)(A) also contains within its terms language specifically requiring the Commission "to consider . . . the impact that the grant of retransmission consent may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation under section 623(b)(1) to ensure that the rates for the basic service tier are reasonable."[74]

These provisions constitute, respectively, a broad, facial grant of authority for the Commission to engage in regulatory oversight with respect to the general operation of the retransmission consent regime and a specific mandate to consider the impact of retransmission consent on rates. Nothing in these provisions supports the restrictive view of the Commission's authority that the broadcasters seek to attribute to Section 325(b)(1)(A).[75]

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[73] 47 U.S.C. §325(b)(3)(A).

[74] *Id*.

[75] Certain broadcast commenters claim that that, on its face, Section 325(b)(3)(A) limits the Commission's retransmission consent rulemaking authority to the 45-day period that followed the enactment of the 1992 Cable Act. *See* Opposition of The Local Television Broadcasters, MB Docket 10-71 at 15-16 (filed May 18, 2010) ("Local Broadcasters

Second, subsequent amendments to the Communications Act provide further evidence of the broad scope of the Commission's authority to regulate the broadcasters' exercise of their retransmission consent right. In particular, Section 325(b)(3)(C), which was added to the Act in 1999, commands the Commission to adopt rules prohibiting a broadcasting station that elects retransmission consent from "failing to negotiate in good faith."[76] On its face, this provision does not in any way constrain or otherwise limit the Commission's exercise of the more general rulemaking authority previously granted it in Section 325(b)(3)(A); to the contrary, by imposing on the Commission the obligation to establish and enforce rules requiring good faith negotiations, the 1999 amendment represents an independent grant of authority for the Commission to exercise oversight with respect to both procedural and substantive elements of the retransmission consent process.[77]

Third, as several commenters have pointed out, the Commission also has long-standing authority under Section 309(a) to adopt rules to ensure that broadcasters operate in the public interest as well as ancillary authority under Sections 303(r), 201(b), and 4(i) to prescribe such rules as may be necessary in the public interest to carry out the provisions of

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Opposition"). A virtually identical "one and done" argument was considered and rejected by the Commission in the *Terrestrial Program Access Order*. Citing its own rulings as well as court decisions the Commission noted that it "has an obligation to consider, on an on-going basis, whether its rules should be modified in response to changed circumstances." *See Review of the Commission's Program Access Rules and Examination of Programming Tying* Arrangements, 25 FCC Rcd 746, 752 n.23 (2010) ("*Terrestrial Program Access Order*").

[76] 47 U.S.C. § 325(b)(3)(C).

[77] In 2004, Congress amended Section 325(b)(3)(C) to direct the Commission to adopt rules extending the good faith negotiation obligation to MVPDs. Satellite Home Viewer Extension and Reauthorization Act of 2004, § 207, passed as part of Pub.L. 108-447, 118 Stat. 2809 (2004).

the Communications Act.[78] Both the courts and the Commission have broadly construed these grants of authority and several of the instances in which the Commission has relied on this authority are pertinent here. For example, the Commission has relied on its direct and ancillary authority to ensure broadcasters operate in the public interest as the basis for regulating the network-affiliate relationship and for adopting rules governing the circumstances under which a broadcast station make certain operational changes that impact the availability of the station's signal to the viewing public it is licensed to serve.[79]

C. The legislative history of Section 325(b) supports a broad interpretation of the Commission's authority to regulate the conduct and resolution of retransmission consent negotiations.

In the Introduction and Background section of these reply comments, Mediacom and Suddenlink have set out in detail a number of specific statements from the legislative history of the 1992 Cable Act regarding Congress' understanding of the scope of the Commission's authority to engage in meaningful oversight of retransmission consent and to intervene to protect consumers from unreasonable retransmission consent terms and conditions and from service interruptions. The quoted statements leave absolutely no doubt that Congress understood the Commission to have broad authority to ensure retransmission consent operates in the public interest and expected the Commission to use that authority when necessary. While we will not repeat all of those statements here, it is worth highlighting the

[78] *See, e.g.*, APPA Comments at 15; 47 U.S.C. §§ 309(a); 303(r), 201(b), 154(i). *See also*, *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

[79] *See, e.g.*, 47 C.F.R. §§ 73.658 (network-affiliate territorial exclusivity); 73.1125 (main studio location); 73.1690 (modification of transmission systems); 73.1740 (minimum operating schedule).

following comments made by Senator Inouye, whose views should be accorded significant weight in light of his position as author of the retransmission consent provision:

> **I am confident, as I believe the other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers. In this regard, the FCC should monitor the workings of this section following its rulemaking implementing the regulations that will govern stations' exercise of retransmission consent so as to identify any such problems. If it identifies such unforeseen instances in which a lack of agreement results in a loss of local programming to viewers, the Commission should take the regulatory steps needed to address the problem.**[80]

It is difficult to imagine a clearer, more direct rebuttal of the arguments that the broadcasters have made concerning the scope of the Commission's authority. Senator Inouye's statement acknowledges that the Commission has the authority to intervene to help resolve retransmission consent disputes under both existing law and the terms of Section 325 and confirms that the Commission is expected to exercise its oversight on an on-going basis and adopt new rules if "unforeseen" problems arise. That course of action is precisely the course of action proposed in the Petition but opposed by the broadcasters.

Nothing that has occurred since then supports a different understanding of Congress' intent with respect to the scope of the Commission's authority to ensure that consumers are not harmed by the retransmission consent process. For example, in January 2007, Senator Inouye (joined by Senator Stevens, the then ranking member of the Senate Commerce Committee), wrote to Chairman Martin, citing the 1992 floor debate and urging that the Commission take steps to ensure that Americans "not be shut off from broadcast

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[80] 138 Cong. Rec. S643 (Jan. 30, 1992) (emphasis added). Senator Inouye made the above statement as part of a colloquy with Senator Burdick.

programming" while the parties negotiate for retransmission consent.[81] And even more recently, on December 30, 2009, Senator Kerry (the current chairman of the Senate Commerce Committee's Subcommittee on Communications, Technology and the Internet) cited the Inouye-Stevens letter in a press statement urging the Commission "to intervene and mandate continued carriage and arbitration" in connection with Time Warner Cable's year-end retransmission dispute with FOX.[82] These various statements by key legislators, made contemporaneously with the enactment of Section 325(b) and adhered to over an extended period of time, constitute weighty evidence in favor of a broad reading of the Commission's authority to adopt new rules to protect consumers from the imbalance that is distorting retransmission consent negotiations.

D. Commission precedent and case law confirm that the Commission can and should find that it has the requisite legal authority to protect consumers through the adoption of meaningful changes to its rules governing the exercise of retransmission consent.

The final sources of interpretive guidance that the Commission can and should consult in considering whether Section 325(b)(1) bars it from engaging in meaningful oversight of the conduct and resolution of retransmission consent negotiations are its own decisions and the relevant case law. At every turn, these sources dictate the conclusion that the broadcasters have mischaracterized the law and that the Commission has the requisite authority and, indeed, the responsibility, to update its rules governing the exercise of retransmission consent so that they protect the public interest.

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[81] Letter from Senators Daniel Inouye and Ted Stevens to FCC Chairman Martin (Jan. 30, 2007).

[82] *See* Press Release, Kerry on Time Warner Cable-Fox Dispute: Denying 4 Million Consumers Programming is No Negotiation Tactic (December 30, 2009) *available at* http://kerry.senate.gov/cfm/record.cfm?id=321258.

As a counter to the argument that Section 325(b)(3)(A) allows the Commission to adopt the types of regulatory reforms proposed in the Petition and in the comments supporting the Petition, some broadcasters argue that Section 325(b)(3)(A) merely authorizes the Commission to adopt procedural rules relating to a broadcaster's must carry/retransmission consent election.[83] That construction is contrary to the legislative history discussed above. Moreover, it is contradicted by the Commission's own actions in its initial retransmission consent rulemaking proceeding in 1993.

In the 1993 rulemaking proceeding, the Commission considered regulatory proposals covering a wide range of issues arising in connection with the exercise of retransmission consent, including issues relating to the substance of retransmission consent contracts.[84] While the Commission considered, but declined to adopt rules specifically addressing retransmission consent rates or limiting the assertion of network non-duplication protection by stations electing retransmission consent,[85] it did not claim that it lacked the authority to do so. Rather, the Commission deferred adopting rate rules based on its assumption that its general rate rules would be sufficient to protect consumers.[86] Significantly, the Commission indicated that it would "closely monitor" retransmission consent fees and "reexamine" whether additional measures were needed to ensure that such fees were not having "an

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[83] *See, e.g.*, NAB et al. Opposition at 69.

[84] *See generally Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 (1993) ("*Broadcast Signal Carriage Issues Order*").

[85] *Broadcast Signal Carriage Issues Order*, 8 FCC Rcd at 3006.

[86] *See id*.

unwarranted impact on basic tier rates."[87] Similarly, the Commission decided not to make changes in the network non-duplication rules based principally on the absence of record evidence "that subscribers are being deprived of network programming" as a result of demands for network non-duplication protection by stations electing retransmission consent.[88]

Although the Commission did not adopt rate rules or network non-duplication relief, it did adopt other rules directly impacting the substance of retransmission consent agreements. In particular, the Commission adopted a specific rule barring local broadcasters and MVPDs from entering into exclusive retransmission consent agreements, even though participants in a "free" marketplace typically can negotiate over exclusivity and even though there was nothing in the Act expressly authorizing the Commission to adopt such a limitation. The Commission's adoption of this prohibition contradicts claims that Section

[87] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, ¶ 247 (1993). Today, however, it is far from clear that the rules governing basic service tier rate increases are sufficient to protect consumers from rapidly escalating retransmission consent fees that could hit $20 per subscriber per month within the next few years if left unchecked.

[88] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723, 6787 (1994). The use of network non-duplication by retransmission consent stations to deny consumers an alternative source of programming in the event of a shut down order has become a reality; indeed, in order to further increase their leverage in retransmission consent negotiations, broadcasters have begun pursuing relief from the "significantly viewed" exception to the network non-duplication rules with renewed vigor. *See, e.g.*, *Providence TV Licensee Corp.*, DA 10-769 (MB 2010); *KXAN, Inc.*, 49 CR 1184, DA 10-589 (MB 2010); *WUPW Broadcasting, LLC*, 49 CR 1055, DA 10-460 (MB 2010).

325(b)(1) leaves the decision as to whether to enter into a retransmission consent agreement with an MVPD solely in the hands of the broadcaster without Commission scrutiny.[89]

The Commission also found that it had the authority to require that retransmission consent agreements cover an "entire program" day (despite the absence of an express grant of authority to do so) and to extend various requirements found in the must carry provision (Section 614 of the Act) to retransmission consent stations despite an express statutory provision stating that "the provisions of section 614 shall not apply to the carriage of the signal" of a station electing retransmission consent.[90] Indeed, the Commission even concluded that it had the power to decide that the refusal of a network affiliate to grant retransmission consent may be "unreasonable" in certain circumstances.[91]

Finally, the issue of whether the Commission has the authority to require interim carriage warrants specific attention. The Commission can and does order temporary relief in order to maintain the status quo in a wide range of circumstances, even in the absence of express authority to do so.[92] Indeed, the seminal case establishing the broad scope of the

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[89] Congress subsequently codified the bar on exclusive retransmission consent agreements in Section 325(b)(3)(C). However, that action was taken principally to place a "sunset" on the prohibition, not to address some perceived limitation in the Commission's authority to have adopted it.

[90] *Broadcast Signal Carriage Issues Order*, 8 FCC Rcd at 3004; 47 U.S.C. § 325(b)(4).

[91] *Id.* at 3000. The Commission specifically noted that it had interpreted Section 325(a), which bars a broadcaster from retransmitting another broadcaster's signal without its express consent, as not sanctioning arbitrary or unreasonable denials of such consent. *Id*. (citing *KAKE-TV and Radio*, 10 R.R. 2d 799, 801 (1967)).

[92] For example, in 2000, the Commission issued an order authorizing a cable operator to continue to carry a broadcast station on a channel other than the station's over-the-air channel despite having made an initial finding that the station had an absolute statutory right to on-channel carriage. *Brunson Communications, Inc. v. RCN Telecom Services, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 12883 (CSB 2000). The order authorizing

Commission's ancillary authority, *United States v. Southwestern Cable Co.*, ratified the Commission's power to grant interim relief.[93] Yet, relying on a ten-year statement by the Commission in its *Good Faith Order*, the broadcasters contend that the Commission already has concluded that Section 325(b)(1)(A) leaves it without the legal authority to adopt a rule requiring interim carriage pending resolution of a retransmission consent dispute.[94]

Mediacom and Suddenlink submit that, insofar as the Commission concluded in the *Good Faith Order* that Section 325(b)(1)(A) reflected an expression of Congress' "unambiguous" intent to bar the Commission from adopting an interim carriage requirement, the Commission should reconsider the wisdom of that judgment. It is well settled that "an initial agency interpretation is not instantly carved in stone"[95] To the contrary, as the Commission recently observed in its *Terrestrial Program Access Order,* it is the Commission's duty to consider varying interpretations and policy judgments on an on-going basis.[96] In this case the Commission certainly has ample grounds for revisiting and reversing its now ten-year old interpretation of Section 325(b)(1)(A).

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carriage remained in effect for nearly a year and a half while the Commission considered RCN's application for review. And even after denying RCN's application for review, the Commission concluded that the public interest would be served by extending the period of interim relief for another 180 days to allow RCN to reconfigure its system. *Brunson Communications, Inc. v. RCN Telecommunications Services, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 21499 (2000).

[93] *United States v. Southwestern Cable Co*., 392 U.S. 157 (1968).

[94] *See, e.g.*, NAB et al. Opposition at 17-18; Local Broadcasters Opposition at 13-14 (citing *Good Faith Order*, 15 FCC Rcd at 5469).

[95] *Terrestrial Program Access Order,* 25 FCC Rcd at 752 n.23 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 863-964 (1984); *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

[96] *Id.*

More specifically, as detailed throughout these reply comments, circumstances are radically different today than they were when the Commission first considered its authority to adopt an interim carriage requirement. In addition, Section 325(b)(1)(A) does not contain language of the type Congress typically uses when it seeks to limit the scope of the Commission's authority Yet, there is no indication in the *Good Faith Order* that the Commission gave any consideration to either the legislative history of Section 325(b) or to the affirmative grants of authority in Section 325(b)(3)(A) and the Commission's ancillary authority to carry out those grants of authority.

Actions taken by the Commission subsequent to the *Good Faith Order* lend further support to the conclusion that the agency erred in finding that it lacked the legal authority to adopt an interim carriage rule. For example, as the Petition and several of the comments filed in support of the Petition correctly note, the Commission on two recent occasions has asserted the authority to order interim carriage of non-broadcast cable networks even in the absence of a contractual agreement between the parties authorizing such carriage.[97]

Lastly, there are striking parallels between the instant proceeding and the Commission's 2007 *Cable Franchising Order* proceeding. In that proceeding, the Commission interpreted a statutory provision – Section 621(A)(1) – that was not dissimilar to Section 325(b)(1) in that, like Section 325(b)(1), it barred cable operators from engaging in certain acts without the express consent of a third party (in this case providing cable service

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[97] *See id.* at 794-797*; Sky Angel U.S., LLC Emergency Petition for Temporary* Standstill, DA 10-679 (MB 2010). In its January 2007 order denying Mediacom's retransmission consent complaint against Sinclair, the Commission expressly stated that, if Mediacom and Sinclair would agree to submit to arbitration, the Commission would "require Sinclair to authorize Mediacom's continued carriage of its stations' signals" – a statement that necessarily implies a determination on the part of the Commission that it has the authority to issue an interim carriage order. *See Mediacom Communications Corporation*, 22 FCC Rcd 47, ¶ 25.

without a “franchise” – *i.e.*, an express written authorization for the cable operator to build and operate a cable system).[98]

Relying on language in Section 621(a)(1) prohibiting unreasonable denials of franchise applications – a provision that contains no reference to the Commission whatsoever – and on its ancillary authority under Sections 201(b), 303(r), and 4(i), the Commission concluded that it had the requisite legal authority not only to establish a time limit within which a franchise had to either grant or deny a franchise application, but also to adopt a rule under which a franchising authority’s failure to act within the specified term period would be deemed by operation of law to constitute a grant of the required franchise on an “interim” basis on terms and conditions set by the Commission.[99] In reaching this conclusion, the Commission noted that “[t]here is nothing in the statute or the legislative history to suggest that Congress intended to displace the Commission's explicit authority to interpret and enforce provisions in Title VI, including Section 621(a)(1).”[100] The Commission’s *Cable Franchising Order* was upheld by the United States Court of Appeals for the Sixth Circuit, which found that the absence of any express provision giving the Commission a role in the franchising process did not preclude the Commission from “filling the gap” in the statue through the exercise of its regulatory authority.[101]

In light of the above-described case law and the relevant statutory language and legislative history, there can be no doubt that the Commission has broad authority to adopt

[98] *Id. See also* 47 U.S.C. §§ 621(b)(1) (barring cable operators from providing cable service without a franchise); 602(9), (10) (definitions of “franchise” and “franchising authority”).

[99] *Cable Franchising Order*, 22 FCC Rcd at 5134.

[100] *Id.* at 5131-32.

[101] *Alliance for Community Media v. FCC*, 529 F.3d 763.

and enforce rules governing the exercise of retransmission consent. Moreover, to the extent that the Commission previously concluded that Section 325(a)(1) prevents it from adopting interim carriage or dispute resolution rules in order to protect consumers, the Commission should now find that it reached that conclusion in error and is no longer bound by such an interpretation of its authority.[102]

III. The Commission Should Commence a Rulemaking Proceeding to Consider a Wide Range of Proposals for Updating and Reforming Its Rules Governing the Exercise of Retransmission Consent, Including Its Rules Implementing the Good Faith Negotiation Requirement.

Having demonstrated above that the current retransmission consent regime is breaking down to the detriment of consumers and that the Commission has the requisite authority to protect consumers by updating and reforming its rules governing the exercise of retransmission consent, Mediacom and Suddenlink now turn to the question of what specific changes should be made to the Commission's rules. At the outset, we note that the Petition suggested that the Commission consider the adoption of a dispute resolution mechanism

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[102] *Cf. Terrestrial Program Access Order*, 25 FCC Rcd at 795. The Broadcast Networks argue that an interim carriage requirement would constitute "forced speech" in violation of their rights under the First Amendment. Network Broadcasters Comments at 11-12. We expect that the Commission will see the irony in the broadcasters, who have argued for decades that the First Amendment is not offended when the government requires cable and DBS providers to carry their stations, now claiming to have a constitutional right to prevent their signal from being delivered to the viewers that they are licensed to serve. Leaving aside some of the more laughable aspects of the Network Broadcasters misreading of the forced speech doctrine (*e.g.,* presumably the broadcasters believe that Commission rules and license terms obligating stations to serve a particular geographic area also are unconstitutional), this argument once again serves to highlight the distinction between a broadcaster's signal and the content transmitted by that signal. An interim retransmission consent carriage rule would only relate to the signal, which in and of itself is not "speech." The retransmission of the broadcaster's "speech" (*i.e*., the programs transmitted via its signal) is addressed by the compulsory license provisions of the Copyright Act. If, after 34 years, the broadcasters intend to launch a constitutional challenge to the Copyright Act, we would expect that they would include within that challenge other statutory copyright licenses, including those relied upon by segments of the broadcasting industry. *See, e.g*., 17 U.S.C. §§ 112 (ephemeral recordings), 114 (public performance of sound recordings).

(such as arbitration or the establishment of a process for determining the reasonableness of retransmission consent rates) and an interim carriage requirement. The Petition also proposed that the Commission bar broadcasters from engaging in mandatory tying practices with respect to retransmission consent agreements. As signatories to the Petition, Mediacom and Suddenlink endorse these suggestions.

However, Mediacom and Suddenlink believe that the Commission also should seek comment in a rulemaking proceeding on other ideas for reforming the retransmission consent process. A number of commenters have put forward what we believe are promising ideas for regulatory reform. These include suggestions that the Commission explore the adoption of rules: (i) barring broadcasters from discriminating among and between MVPDs with respect to the terms and conditions of retransmission consent;[103] (ii) requiring broadcasters to "synch up" the expiration dates of retransmission consent agreements with all of the MVPDs in a market and to give extensions on expiring agreements on an "all or none" basis;[104] (iii) mandating greater transparency with respect to retransmission consent terms and conditions, including prohibitions against non-disclosure clauses in retransmission consent agreements;[105] (iv) adopting more specific standards for what constitutes a violation of the good faith negotiation requirement;[106] and (v) limiting the exercise of network non-

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[103] *See* ACA Comments at 19-21; Cablevision Comments at 17-18; Pioneer Comments at 6-7.

[104] *See* AT&T Comments at 11-12.

[105] *See* Cablevision Comments at 3; Comments of RCN Telecom Services, Inc., MB Docket 10-71, at 8-9 (filed May 18, 2010) ("RCN Comments").

[106] *See* APPA Comments at 19-20; RCN Comments at 10.

duplication rights by local stations and/or restricting the national networks from dictating whether and on what terms their affiliates can grant retransmission consent.[107]

As a supplement to (and in some instances as an expansion of) these suggestions, Mediacom and Suddenlink propose the following additional ideas for retransmission consent reform and urge that they be offered for comment in a Notice of Proposed Rulemaking:

A. Strengthen the rules implementing the good faith negotiation requirement.

In implementing the good faith negotiation requirement in 2000, the Commission properly recognized that "Congress has signaled its intention to impose some heightened duty of negotiation on broadcasters in the retransmission consent process….obligations greater than those under common law."[108] Yet, as discussed above, the Commission has largely abdicated the responsibility conferred upon it by Congress to implement and enforce this "heightened duty."[109] For example, the Commission has adopted "*per se*" standards that are easily evaded, as was shown by the Commission's approval of Sinclair's *de facto* "take it or leave it" bargaining tactics during its 2006 dispute with Mediacom.[110] Moreover, despite

[107] *See* APPA Comments at 20; AT&T Comments at 12; Cox Comments at 5-8; Comments of Free Market Operators, MB Docket 10-71, at 2 (filed May 18, 2010).

[108] *Good Faith Order*, 15 FCC Rcd at 5445.

[109] The fact that Congress singled out negotiations between broadcaster and MVPDs for this higher duty of good faith is, of course, compelling evidence that attempts by broadcasters to compare the marketplace for non-broadcast cable networks to the retransmission consent marketplace are unavailing.

[110] Mediacom alleged in its 2006 complaint against Sinclair that tactics such as threatening to increase the amount of consideration being demanded for retransmission consent if that demand is not accepted or raising the price in response to a lower counterproposal are indistinguishable from "take it or leave it" bargaining. The Media Bureau, however, concluded that there is nothing inappropriate about a broadcaster increasing its price

having suggested in the *Good Faith Order* that outrageous demands for consideration might be actionable as bad faith under the "totality of the circumstances" test,[111] the Commission has given no indication that there is any level of consideration that it would consider outrageous enough to warrant scrutiny.

What makes the Commission's failure to give any teeth to the good faith rules particularly troublesome is that, when the Commission adopted those rules, it stated that it would "continue refining and clarifying the responsibilities of the parties to retransmission consent negotiations."[112] While the Commission has not done so up until now, the proposed rulemaking proceeding provides a perfect opportunity to flesh out the good faith rules in a way that will afford meaningful protection to consumers. In particular, Mediacom and Suddenlink suggest the following specific actions:

1. Define what constitutes "competitive marketplace considerations"

Mediacom and Suddenlink agree with those commenters that have raised discriminatory pricing on the part of broadcasters as an issue that the Commission should address. Under Section 325(b)(3)(C)(ii) and (iii), discriminatory pricing is not a failure to negotiate in good faith "if such different terms and conditions are based on competitive marketplace considerations."[113] Thus, one way for the Commission to address the problem of discriminatory pricing is to clarify when negotiations will be deemed to have taken place on the basis of "competitive marketplace considerations."

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demands over the course of a negotiation, essentially cutting the heart out of the "take it or leave it" standard. *See Mediacom v. Sinclair*, 22 FCC Rcd at 43.

[111] *Good Faith Order*, 15 FCC Rcd at 5458.

[112] *Id.*

[113] 47 U.S.C. § 325(b)(3)(C)(ii) and (iii).

For example, the Commission might define a competitive marketplace for retransmission consent negotiations as one in which there is more than one affiliate (either local or distant) of the same network with the right to grant the MVPD retransmission consent and whose programming would not be subject to network non-duplication blackout. As part of this approach, the Commission should consider exempting cable systems from the network non-duplication rule unless the signal of the station requesting protection is available to at least 85 percent of the local market households passed by the cable operator or where the signal that would be subject to blackout is significantly viewed or places its "Noise Limited Digital Contour" over any portion of the cable community. The burden of proof of establishing that there is a competitive marketplace should be placed on the broadcaster.

2. Strengthen the prohibition on "take it or leave it" negotiating positions and restrict third-party agreements that prevent or discourage a broadcaster from granting retransmission consent.

Another good faith-related set of reforms that the Commission can and should consider would involve adopting a more aggressive approach to controlling *de facto* "take it or leave it" bargaining. For example, the Commission should consider adopting a rule that would require a station, upon request from an MVPD, to provide alternate contractual proposals, such as an agreement for a specific term of years designated by the MVPD, or for carriage of the station on an "unbundled" basis. The Commission also should expressly bar any arrangements between a broadcaster and a third party that discourage the broadcaster from granting retransmission consent (such as network-affiliate agreements that prevent a station from granting out-of-market retransmission consent or "bounty" arrangements between a broadcaster and a third-party MVPD whereby the station receives compensation from the third party MVPD for subscriber additions as a result of the retransmission consent dispute). These rules also should require each separate station licensee in a DMA to negotiate separately from other stations in the DMA, thus putting an end to the practice of stations that are parties to LMAs, joint services agreements, etc. negotiating jointly.[114]

B. Require greater transparency.

The Commission can and should consider seeking comment on proposals that would add greater transparency to the retransmission consent process. While these proposals would not be a substitute for meaningful dispute resolution and consumer protection measures, it would bring a much-needed level of rationality to the retransmission consent process.

For example, the Commission could require broadcasters to publish a rate card with standard three-year cash for carriage terms. A cable operator would have the choice of accepting these terms or negotiating for different terms, such as a longer or shorter agreement; bundled carriage; non-cash terms; tier placement, etc.).

C. Establish a framework that encourages voluntary resort to alternative dispute resolution.

In addition to mandatory dispute resolution procedures, the Commission may also want to explore options for a framework that encourages voluntary use of binding arbitration. One such approach would allow an MVPD to give notice to the Commission that its negotiations with a broadcaster have reached an impasse. The MVPD and the broadcaster would then decide whether to submit to binding arbitration with interim carriage. If either the broadcaster or the MVPD objected to binding arbitration, carriage would continue on an interim basis during a limited "competitive negotiation period." During this period, network

[114] The Commission's authority to prohibit an entity from exercising the retransmission consent rights of stations with which it has an LMA or other contractual relationship arises from, *inter alia*, Section 325(b)(1), which specifically assigns control of retransmission consent rights to the "originating station" as well as from the Commission's more general authority to ensure that broadcasters operate in the public interest. 47 U.S.C. § 325(b)(1).

affiliation agreements limiting a station's right to grant retransmission consent to an out-of-market MVPD or in any requiring payment of a share of the station's retransmission consent fees back to the network would be deemed waived and the carriage of an out-of-market station pursuant to a retransmission consent agreement reached during this period would be exempt from network non-duplication obligations. And, in order to protect localism, if the MVPD decided to carry an out-of-market station under an agreement reached during this competitive negotiation period, the local station could "re-elect" must carry and obtain carriage of its signal, albeit without any compensation.

This "options" approach would allow the parties to test the marketplace to determine if the terms being demanded by the local station (with whom the MVPD can continue to negotiate) are reasonable. It also would only require minimal involvement by the Commission, since arbitration, if it occurred, would be by mutual consent and thus would not need to be subject to *de novo* review. And, as with the *a la carte* proposal described above, it would protect consumers by ensuring that the cost of retransmission consent more closely reflects the value of using an MVPD to get local programming instead of using an antenna.

D. Adopt other "process" reforms.

As several commenters have suggested, the Commission can and should consider certain procedural reforms, such as the adoption of a requirement that retransmission consent expiration dates be "synched up" and that extensions be granted on an "all or nothing" basis.[115] Other procedural reforms worth considering include changing the election deadline from October 1 to April 1, with a 90-day window for negotiations between April 1 and June 30. The original October-December period was chosen by the Commission in part because it

[115] *See* AT&T Comments at 11-12.

allowed negotiations to be resolved in alignment with the January 1 commencement of the first semi-annual accounting period of the year for purposes of the cable compulsory license.[116] The second accounting period begins July 1 of each year and, thus, moving the election date and negotiating window would not be inconsistent with the reasoning underlying the original date selection. Also, the Commission could extend the "no drop during sweeps" period to cover the 45 days before a sweeps period begins.

CONCLUSION

The Petition essentially poses two questions: are the Commission's existing rules governing broadcasters' exercise of their retransmission consent rights adequately protecting consumers and, if not, does the Commission have the authority to adopt meaningful reforms to those rules? As the record clearly establishes, the answer to the first question is no, while the answer to the second question plainly is yes. Consequently, the Commission can, should, and, indeed, must grant the Petition and commence the requested rulemaking proceeding.

[116] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965, 3002 (1993).

Respectfully submitted,

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